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**U.S. Department of Homeland Security**

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, 3/F

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Washington, DC 20536

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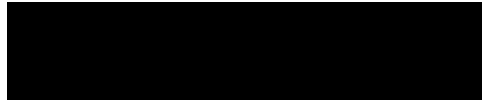


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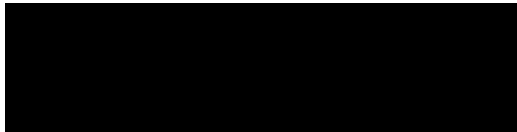
**JAN 21 2004**

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:




**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant and deli business. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor, and continuing. The petition's priority date in this instance is December 14, 1999. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated December 26, 2001, the director required

evidence of the change of the petitioner's name from Daily Fresh Food Inc. d/b/a La Prima (predecessor) to Lascari's and Sons, Inc. (successor). Also, the director exacted proof of the change of ownership to the successor and its assumption of the rights, duties, obligations, and assets of the predecessor.

Another RFE, dated April 16, 2002, and a notice of intent to deny, dated May 20, 2002, exacted official copies of income tax returns for 1999 and 2000. In response, counsel submitted the petitioner's tax returns for fiscal years (FY) 1998-2000 beginning October 1, 1998, namely, Form 1120, U.S. Corporation Income Tax Return, of Lascari's. These reflected taxable income before net operating loss deduction and special deductions of \$41,461 in FY 1998, and \$202,660 in FY 1999, equal to or greater than, the proffered wage. For 2000, however, Form 1120 reported a loss, (\$116,586). Also, Schedule L of Form 1120 for 2000 reported a deficit of current assets of (\$31,579) plus current liabilities of \$110,765, or a total deficit of net current assets of (\$142,344).

In his decision, dated August 30, 2002, the director ignored the lack of documentation of the change of ownership from the predecessor. Rather, he focused on the issue of the ability to pay the wage. The director concluded that the evidence failed to establish the petitioner's ability to pay the proffered wage, as of the priority date and continuing, and denied the petition.

On appeal, counsel submits three (3) selected bank statements of Lascari's, the successor, for the period from June 29, 2002 to September 30, 2002.

Counsel contends that:

We strongly believed [sic] that the company is stable enough and capable of paying the employee to work in our company as a full time employee. We are submitting Bank Statements to show the amount of monthly cash flows.

The bank account statements, on the contrary, do not relate to the period from October 1, 2000 to September 30, 2001. As noted above, during that period, the petitioner/successor suffered a loss and deficit of net current assets. No evidence demonstrates either the predecessor or successor's ability to pay the proffered wage in FY 2000.

The petitioner did not document the change of the ownership from the predecessor to the petitioner. Lascari's undated letter

affirmed its desire to hire the beneficiary. The record included the predecessor's business license, which showed an expiration date of December 31, 2001. No evidence showed the predecessor's ability to pay the proffered wage at the priority date and continuing until the successor assumed ownership. The successor's business license, which showed an expiration date of December 31, 2002, neither documented a contract nor established a date by which the successor replaced the predecessor. For this additional reason, the petition may not be approved.

The record contains no evidence that Lascari's qualifies as a successor in interest to La Prima. This status requires documentary evidence that Lascari's has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor in interest. In addition, in order to maintain the original priority date, a successor in interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The AAO may act only on the record of proceedings. The record indicates no date that the successor assumed the predecessor's interest. Even on appeal, any term of the assumption of ownership is omitted.

The director's RFE of December 26, 2001, provided ample opportunity to show when Lascari's assumed all of the rights, duties, and obligations of the predecessor company. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The record contains no evidence of La Prima's ability to pay the proffered wage as of the priority date and continuing until Lascari's replaced it as a successor in interest. The record contains only tax returns, bank statements, and unaudited financial statements of the alleged successor.

After a review of the federal tax returns, business licenses, bank statements, and unaudited financial statements, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date

of the petition and continuing.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed